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In the Supreme Court of the United States

No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,
Petitioner,

vs.

KALO BRICK & TILE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action arises out of the Chicago, North Western Transportation Company's ("CNW") negligent failure to maintain its branch line to the plant of Kalo Brick & Tile Company ("Kalo").

On September 13, 1974, Kalo filed its Petition in the Iowa District Court for Webster County. Kalo's Amended Petition alleged that because of the CNW's failure to use

reasonable care in maintaining its branch line track, the branch line became unserviceable on April 4, 1973, which in turn forced Kalo to close its business to its resulting detriment.

Kalo's claim of actionable negligence was based upon the CNW's common law duties made actionable by §479.122, Iowa Code 1973; and its duty to furnish suitable car service pursuant to §479.3, Iowa Code 1973. Kalo also alleged common law tortious interference with contractual relationships.

The CNW answered that:

(1) Its application to the Interstate Commerce Commission (ICC), filed November 14, 1973, for a Certificate of Public Convenience and Necessity permitting abandonment of the Kalo branch line preempted Kalo's right to litigate similar factual issues in a state court action because Kalo had participated in the ICC proceedings;

(2) Kalo's sole remedies were either to participate in the abandonment proceedings before the ICC pursuant to 49 U.S.C.A. §§1(18) and 1(19) or a suit for injunction pursuant to 49 U.S.C.A. §1(20).

On April 30, 1976, the Commission entered an Order permitting abandonment, but only after a Certificate of Abandonment was subsequently issued.

In its Findings of Fact, Conclusions of Law and Judgment filed July 29, 1977, the trial court dismissed all of Kalo's claims for want of subject matter jurisdiction finding that:

(1) Kalo's claim was one for wrongful abandonment rather than one for failure to provide car service, and as a consequence Kalo's exclusive remedy was in Federal

court or before the ICC which had primary jurisdiction in either case;

(2) As a concomitant of the ICC's primary jurisdiction, Kalo's participation in the abandonment proceedings collaterally estopped it from relitigating issues adversely determined by the ICC.

The Iowa Court of Appeals reversed and remanded for a new trial holding that:

(1) By virtue of 49 U.S.C. §10103 the state court had concurrent jurisdiction, as remedy provided by Iowa law was not inconsistent with the remedies contained in the Interstate Commerce Act;

(2) Kalo's claim did not raise issues requiring the exercise of administrative discretion but rather issues of fact within the conventional experience of judges and as a result the doctrine of primary jurisdiction was not applicable.

On November 30, 1979, the Iowa Supreme Court, *en banc,* overruled and denied the Chicago North Western's Application for Further Review.

The facts of the case are as follows:

For in excess of 50 years, Kalo relied upon the CNW and its predecessors in interest as its primary and principal source of transportation for its clay tile products. Kalo was initially serviced by the Minneapolis and St. Louis Railroad which provided suitable car service until it was acquired by the Chicago North Western Transportation Company in 1960. After the CNW took over the branch line serving the Kalo plant, service began to deteriorate. Beginning in 1961 and continuing into 1967, the branch line serving the Kalo plant was intermittently out of service due to earth slides which damaged the tracks

serving the Kalo plant. In 1967, the Chicago North Western leased and agreed to maintain a portion of the Fort Dodge, Des Moines and Southern Railway track which provided alternate access to the Kalo plant.

In March of 1973, ponded water was discovered around a portion of the CNW's leased track contrary to sound maintenance practice. During the first few days of April 1973, earth slides occurred along the leased track and other slides were developing because of improper maintenance procedures.

On April 4, 1973, the Chicago North Western notified Kalo that it could no longer provide cars at the Kalo plant because of the condition of the track and roadbed.

Without rail service, Kalo was unable to compete in the clay products market due to the substantially higher cost of transporting their product by motor freight. As a result, Kalo notified its customers on April 18, 1973, that it was going out of business after honoring existing contracts.

On November 14, 1973, after Kalo had stopped production, sold its inventory and otherwise disposed of its assets, the CNW applied to the Interstate Commerce Commission for permission to abandon its line to Kalo based partially on the fact that the Kalo plant no longer existed. On April 30, 1976, an Order was filed by the Commissioner permitting abandonment but only after the effective date of the certificate of abandonment subsequently issued.

REASONS FOR DENYING THE WRIT

I.

The Iowa Supreme Court Decision Correctly Held That A State Court Has Concurrent Jurisdiction Of Claims Against A Rail Carrier For Negligence, Failure To Provide Car Service, And Tortious Interference As They Are Cumulative Remedies Arising Out Of State Law Expressly Preserved By The Interstate Commerce Act.

The CNW asserts that a state court's jurisdiction over a rail carrier for damage claims based upon negligence,[1] failure to provide car service,[2] and tortious interference has been preempted by the Interstate Commerce Act. 49 U.S.C. §1 *et seq.* The federal question presented by the CNW is not substantial as it has been settled by prior decisions of this Court. *Zucht v. King*, 260 U.S. 174 (1922).

The CNW characterizes Kalo's claims as ones for wrongful abandonment or failure to provide car service.[3] However characterized, the issue presented for review does not generate a substantial federal question because: (1) The remedies created by the Interstate Commerce Act are cumulative and do not exclude or otherwise preempt a litigant's express right to pursue other remedies in state law actions pursuant to 49 U.S.C. §10103; *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 127-133

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1. §479.122, Iowa Code 1973.

2. §479.3, Iowa Code 1973.

3. The duty to provide car service set forth at 49 U.S.C. §§11101 and 11121(a) and §479.3, Iowa Code 1973 are declaratory of the common law. See *I.C.C. v. Baltimore & A. R.R.*, 398 F. Supp. 454, 466 (D. Md. 1975), Aff'd 537 F.2d 77 (4th Cir. 1976), Cert. denied 429 U.S. 859 (1976); *Johnson v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 400 F.2d 968 (9th Cir. 1968).

(1915);[4] (2) Kalo's election to sue on state law theories was not inconsistent with federal regulation of branch line abandonments or the provision of car service. *Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 124 (1916).

The Iowa Supreme Court[5] held that the trial court had concurrent jurisdiction of Kalo's damage claims as a cumulative remedy expressly preserved by Section 22 of the Interstate Commerce Act,[6] which provided in part:

> ". . . Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; . . ."

As a result, the Iowa court found concurrent jurisdiction with the federal courts following *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 132 (1915); *Eastern R.R. v. Littlefield*, 237 U.S. 140, 143 (1915); *Pennsylvania R.R. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 123-125 (1916); *Illinois Central R.R. v. Mulberry Hill Coal Co.*, 283 U.S. 275 (1915).[7]

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4. See, *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663-664 (1961).

5. The Iowa Supreme Court, en banc, denied, without written opinion, Petitioner's Application for Further Review. References in the body of the argument to the Iowa court or to the Iowa Supreme Court refer to the written opinion of the Iowa Court of Appeals.

6. The Interstate Commerce Act was revised without substantive change in 1978. Act of Oct. 17, 1978, Pub. L. 95-473, §1, 92 Stat. 1337. Section 22 was revised and codified and now appears as 49 U.S.C. §10103 which provides: "Remedies as Cumulative—The remedies provided under this sub-title are in addition to remedies existing under another law or at common law."

7. *Johnson v. Chicago, Milwaukee, St. Paul & Pacific Rail Co.*, 400 F.2d 968 (9th Cir. 1968); *Humphrey Feed & Grain v. Union Pacific Rail Co.*, 257 N.W.2d 391, 400 (Neb. 1977); *Chicago, Rock Island & Pacific Rail Co. v. Linwood Stone Products Co.*, 258 Ia. 1378, 138 N.W.2d 902 (1965); *Baird Bros. v. Minneapolis & St. Louis R.R.*, 181 Ia. 1104, 169 N.W. 412 (1917); *State Public Utilities Commission v. Baltimore & Ohio Southwestern R.R.*, 181 Ill. 403, 413, 118 N.E.2d 81, 84 (1917).

The Iowa court's decision is consistent with the principle that the question of preemption is determined by the manifested intent of Congress, here demonstrated by the reservation of remedies in 49 U.S.C. §10103. *DeCanas v. Bica*, 424 U.S. 351, 361 (1976). *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

The CNW seeks to distinguish the *Puritan Coal*, *Mulberry Hill*, and *Sonman Shaft* cases because they predated the Esch Car Service Act and the Transportation Act of 1920, which gave the Commission excusive *regulatory* jurisdiction over the provision of car service and railroad line abandonment.[8] The Iowa Court clearly conceded the regulatory supremacy of the Interstate Commerce Commission in matters involving interstate transportation. Notwithstanding the regulatory supremacy of the Interstate Commerce Commission, the Iowa court properly found that Kalo's claim was simply not a case involving state regulation of interstate commerce, nor was Kalo's claim otherwise based upon federal law.[9] The CNW contends, however, that a state court's concurrent jurisdiction over damage claims for negligence amounts to de facto regulation by penalty. The CNW's proposition is tantamount to the suggestion that every rail crossing case constitutes prohibited regulation of interstate commerce. Even if it is assumed that a claim for damages arising under state law has the effect of proscribing certain conduct by imposing damages for failure to perform duties imposed by state law, the state law action may nonetheless proceed in the absence of a demonstrated[10]

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8. 49 U.S.C. §11121, formerly §1(11) of the Interstate Commerce Act includes the Esch Car Service Act as amended by the Transportation Act of 1920.

9. In the absence of state regulation, *Missouri, Pacific R.R. Co. v. Stroud*, 267 U.S. 404, 407-408 (1925); *Powell v. United States*, 300 U.S. 276, 287 (1937); *United States v. New River Co.*, 265 U.S. 533, 541-542 (1923), are inapposite. See, *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663-664 (1961).

10. In the proceedings below, the CNW made no showing that Kalo's state law action burdened interstate commerce.

burden, not contemplated by Congress, upon interstate commerce of an inconsistency with federal law. *DeCanas v. Bica,* 424 U.S. 351, 357-358 (1976); *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142 (1963); *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 767, 770 (1945); *Johnson v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 400 F.2d 968, 971-972 (9th Cir. 1968).

The Iowa Supreme Court decision that the trial court had subject matter jurisdiction to consider Kalo's state law claims properly confirmed the existence of a cumulative state law remedy under 49 U.S.C. §10103, which neither burdens interstate commerce nor interferes with federal law.

II.

The Omission By The Iowa Supreme Court Of Issue Preclusion As A Ground Of Decision Does Not Raise A Federal Question Reviewable Under 28 U.S.C. §1257(3).

The Iowa Supreme Court's omission of issue preclusion in its opinion below might have rested on state grounds. Under such circumstances certiorari is inappropriate. *Durley v. Mayo,* 251 U.S. 277 (1965); *Lynch v. People, ex rel. Pierson,* 293 U.S. 52 (1934).

The Iowa doctrine of issue preclusion requires the satisfaction of four conditions before it may be used defensively to bar relitigation of issues between parties in subsequent proceedings: (1) The issue or cause of action precluded must be identical; (2) The issue must have been raised and litigated in a prior action; (3) The issue must have been material and relevant to a disposition of the prior action; and (4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Schneberger v. United States*

Fidelity & Guaranty Co., 213 N.W.2d 913, 917 (Iowa 1973); *Matter of Evans*, 267 N.W.2d 48 (Iowa 1978). As a corollary, the doctrine applies only to ultimate facts, and not evidentiary facts. *State v. Stergion*, 248 N.W.2d 911, 913 (Iowa 1976).

The Iowa Court could have found that the doctrine was not applicable for any one of the following reasons:

(1) The issues before the Interstate Commerce Commission and the District Court of Iowa were not the same. The case before the District Court involved issues based essentially upon negligence and tortious interference with existing business relations, whereas the ICC proceedings were limited to the question of whether the CNW was entitled to a certificate of convenience and necessity to formally abandon its branch line; *B & B Asphalt Co. v. T. S. McShane Co.*, 242 N.W.2d 279, 286 (Iowa 1976).

(2) The issues framed by the pleadings before the Iowa District Court were not the same as the issues framed by the CNW in its application before the ICC. *Schneberger v. U.S. Fidelity & Guaranty Co.*, 213 N.W.2d 913 (Iowa 1973). See *Commissioner v. Sunnan*, 333 U.S. 591, 598 (1948); *Bayer v. Associated Underwriters, Inc.*, 402 S.W.2d 11, 13 (Mo. App. 1966).

(3) The abandonment issues before the ICC were not material to and postdated Kalo's damage claims for violation of Sections 497.3 (failure to provide car service), and 497.122 (negligence), Code of Iowa 1973, and tortious interference.

(4) The ICC Order [Appendix 34(a)40(a)] did not reach the ultimate facts which were at issue before the Iowa District Court. *Bickford v. American Interinsurance Exchange*, 224 N.W.2d 450, 455 (Iowa 1974); *Bertran v. Glens Falls Ins. Co.*, 232 N.W.2d 527 (Iowa 1975).

(5) Because Kalo's business had been destroyed as a result of the conduct of the CNW by the time it made application for abandonment, Kalo did not have the incentive to fully and vigorously litigate the abandonment issue. See *Parklane Hosiery v. Shore*, 439 U.S. 322, 58 L.Ed.2d 552, 561, 562, n. 15 (1979).

Where the doctrine of issue preclusion could have been found inapplicable or not controlling, the Iowa court would have had no reason to consider the effect of the Supremacy Clause of the United States Constitution. As a consequence, the omission by the Iowa Supreme Court of issue preclusion as a ground of its decision does not raise a federal question reviewable under 28 U.S.C. §1257(3).

III.

The Iowa Supreme Court Decision That The Doctrine Of Primary Jurisdiction Did Not Apply To Kalo's State Law Claim Was Based Upon Established Principles.

The Iowa Supreme Court, relying on the principles set forth in *Far East Conference v. United States*, 342 U.S. 370 (1952) held that the doctrine of primary jurisdiction did not apply to Kalo's state law claims because the grounds asserted for relief raised issues of fact coming within the conventional experience of judges and did not otherwise require the exercise of administrative discretion. The thrust of Kalo's Petition alleged that its damages were sustained as a result of the CNW's negligence and tortious interference with contractual relationships for which it was entitled to assert a state law remedy under 49 U.S.C. §10103. Kalo did not plead, nor did it rely upon any federal statute or regulation.

The doctrine of primary jurisdiction applies only where: (1) The controverted question[11] falls within the jurisdictional scope of a regulatory agency; and (2) The resolution of the question posed requires the exercise of administrative discretion to accomplish uniform policy; or (3) The facts underlying the question are not within the conventional experience of judges and require expertise or specialized knowledge for rational analysis. *Far East Conference v. United States*, 342 U.S. 370 (1952); *United States v. Western Pacific R.R. Co.*, 352 U.S. 59 (1956).

The CNW contends that Kalo's claim of negligence is within the Commission's jurisdiction because it involved the "reasonableness" of the CNW's conduct. As a corollary, the CNW argues that conduct once found to be reasonable by the Interstate Commerce Commission cannot later serve as a basis for a negligence action. A finding by the Commission that the CNW acted reasonably in abandoning the Kalo branch line, however, does not immunize the CNW from Kalo's state law claims. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141-142 (1963). Furthermore, even if the Commission decided that the CNW's conduct was reasonable in the context of abandonment proceedings, that determination is not material to Kalo's state law action because: (1) The ICC's determination of reasonableness was made after Kalo's claim accrued and considered facts existent at the time of the abandonment proceedings, including the fact that Kalo, as the only branch line customer, had gone out of business; (2) The Commission's determination of reasonableness was based upon a different standard than that used to measure Kalo's state law claims; (3) Similarly, Kalo's claim for damages under state law was not dependent upon the Commission or federal law for definition.

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11. See *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

Therefore, the questions that the CNW urged were subject to determination by the Commission were not pertinent to the controverted questions before the Iowa court and were not dependent on the exercise of administrative discretion to answer the ultimate questions necessary to sustain Kalo's state law claims. As a result, the doctrine of primary jurisdiction does not apply. *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

The effect of the CNW's position that Kalo's state law claims for negligence and tortious interference are first subject to Commission consideration in effect permits a railroad to preempt a litigant's right to exercise a state law remedy pursuant to 49 U.S.C. §10103 by superimposing conclusions of a federal administrative agency concerned with substantive considerations unrelated to those facts giving rise to Kalo's claim for relief. By contending that the doctrine of primary jurisdiction applies to Kalo's state law claim while simultaneously arguing that Kalo should be precluded by the findings of the Commission, the CNW seeks to shift lawmaking power from state courts to the Commission, *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 65 (1956), to indirectly eliminate a litigant's right to assert cumulative remedies in state courts under 49 U.S.C. §10103.

CONCLUSION

The Interstate Commerce Act expressly preserves the right of litigants to pursue remedies arising from state law in state courts. The preservation of cumulative remedies by Congress clearly demonstrates that state law claims were not considered unduly burdensome on, or a regulation of, interstate commerce.

In exercising its concurrent jurisdiction the trial court was not required to defer to the Commission because the controverted questions were matters of Iowa and not federal law. In the absence of a determination by the Commission of ultimate facts upon issues material to Kalo's state law claims, the Iowa court was not required to consider collateral estoppel as a ground of decision. The Iowa Supreme Court properly exercised its jurisdiction by confirming Kalo's right to pursue its state law remedies in state court.

For these and the other reasons set forth above, Respondent respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Iowa be denied.

Respectfully submitted,

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